

**INQUIRY INTO REGULATION OF BUILDING
STANDARDS, BUILDING QUALITY AND BUILDING
DISPUTES**

Organisation: NSW Independent Commission Against Corruption
Date Received: 1 August 2019

Mr David Shoebridge, MLC
Chair, Public Accountability Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

1 August 2019

Our Ref: Z17/0031

Dear Mr Shoebridge,

Inquiry into the regulation of building standards, building quality and building disputes

The NSW Independent Commission Against Corruption (the "Commission") wishes to make a brief submission to Public Accountability Committee's *Inquiry into the regulation of building standards, building quality and building disputes*.

The Commission's interest relates primarily to the management of conflicts of interest, which falls within 1(a) of the Committee's terms of reference.

Should the Committee require any further information, please contact Mr Lewis Rangott, Executive Director Corruption Prevention on

Yours sincerely

The Hon Peter Hall QC
Chief Commissioner

Submission by the NSW Independent Commission Against Corruption to Public Accountability Committee Inquiry into the regulation of building standards, building quality and building disputes

(1) Introduction

The Independent Commission Against Corruption (the “Commission”) is created under the *Independent Commission Against Corruption Act 1988* (the “ICAC Act”).

The Commission’s functions include a requirement “*to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct and to promoting the integrity and good repute of public administration*” (s.13(1)(g) of the ICAC Act).

The Commission is aware that the *Building and Development Certifiers Act 2018* is yet to commence and will replace the *Building Professionals Act 2005*. Consequently, the Commission’s submission is focused primarily on the on relevant sections of the newer Act.

(2) Managing conflicts of interest

When performing regulatory work, there is an inherent conflict of interest when the regulated party pays fees to the regulator. As noted in the Commission’s December 2018 report, *Corruption and integrity in the NSW public sector: an assessment of trends and events*, the risk is heightened when “*the regulator is financially dependent on the regulated entity*” and “*the regulated party can act as a customer and take its business to another organisation*”.

This situation well-describes the market for building certification services.

While the Commission often receives complaints about illegal building, it receives relatively few complaints alleging corrupt conduct by a building certifier. Since January 2013, the Commission’s data indicates that it received:

- 3 notices of possible corrupt conduct from the Building Professionals Board
- 1 notice of possible corrupt conduct from the NSW Ombudsman
- 7 notices of possible corrupt conduct from NSW local councils
- 24 complaints from members of the public alleging corrupt conduct.

In addition to these matters, the Commission receives occasional reports from local councils alleging that a development applicant has offered a gift or payment to a certifier. Often this involves an applicant who is not regularly involved in development proposals and/or who comes from a country where it is common to pay small amounts of cash to receive government services. These reports indicate that local councils and council certifiers are well-trained in how to manage and report these situations.

None of the matters raised above have led to findings of corrupt conduct.

On their face, these figures suggest that there is little corruption in the industry. However, for the following reasons, the Commission suspects the risk of corrupt conduct may be understated.

Firstly, many years can elapse between an improper certification decision and the identification of faulty building work. This necessarily limits the likelihood of a viable investigation.

Secondly, unless there is evidence of a corrupt payment or favour, it is difficult to distinguish between incompetence and corruption. The work of a certifier involves the exercise of subjective judgement and discretion. The Building Professionals Board website shows that it has made numerous disciplinary findings against certifiers but as noted above, relatively few of these have been reported to the Commission as suspected corrupt conduct.

Thirdly, the Building Professionals Board generally focuses on the technical errors made by certifiers. Its role does not usually extend to investigating the possibility of an unprofessional relationship with a builder, developer or land owner. In any case, such relationships are difficult to identify because development activity is often carried out via project-specific legal entities that are not easily traced back to the ultimate beneficiaries.

Finally, even in the absence a corrupt agreement, the building/development industry will naturally prefer to engage certifiers who are customer-friendly or lenient. This will signal to the market that lenient certifiers will win more work than competitors who are more thorough and strict. The oversight functions of the Building Professionals Board addresses this problem to a degree but it is not realistic to expect private certifiers to ignore their own commercial interests.

The relevant code of conduct and the definitions of a “conflict of interest” and “pecuniary interest” in the yet to commence *Building and Development Certifiers Act 2018* may not adequately deal with this particular problem. In fact, section 30(2)(b) of that Act specifically excludes normal lawful payments to certifiers from the definition of a pecuniary interest.

Consequently, the Committee should consider the need for:

- a stronger mandate for the Secretary to identify and address situations where a certifier is at risk of becoming financially dependent on a particular customer. This could include enhanced information gathering powers, more frequent audits or inspections and the ability to disrupt improper relationships by rotating the use of certifiers
- refinements to the code of conduct made under section 32 of the *Building and Development Certifiers Act 2018* and associated educational programs.

In any case, the existing code of conduct and its associated guide is dated March 2007 and a revision would be timely.

(3) Conflicts of interest exemptions

The current *Building Professionals Act 2005* provides exemptions for certifiers from complying with conflicts of interest provisions where they are “associated with the council of the area in which the development is to be carried out”.¹ The *Building and Development Certifiers Act 2018* will expand this to allow the department Secretary to issue a wider set of exemptions subject to “regulations [that] may create exemptions”.²

¹ s66(1)(d) and s71, *Building Professionals Act 2005*

² s28, *Building and Development Certifiers Act 2018*

The Commission's experience is that statutory powers that authorise variations to accepted standards require good management to both avoid misuse (such as corruption) and the emergence of adverse consequences to the NSW building certification system.

Good management of the process should involve the Secretary making decisions about exemptions against clear, robust and easily verifiable criteria and only after demonstrating that relevant matters were considered. Additionally, exemptions by the Secretary should be limited in their scope and time.

Scrutiny of the process is also needed to ensure that good management is maintained and enhanced. The Commission therefore suggests that relevant documents, including the certifier's written application, the relevant report to the Secretary and the Secretary's decision, be publicly available.

Relevant compliance mechanisms should also be in place to check that the terms and conditions of any exemption are being adhered to.

(4) Potential for conflicting roles for accreditation authorities

Part 6 of the *Building and Development Certifiers Act 2018* provides for non-government bodies corporate to be appointed as an "accreditation authority". That is, additional regulatory responsibilities could be outsourced. Based on the second reading speech, the Commission understands that this provision is primarily intended to apply to fire safety practitioners.

It is not clear how this arrangement will work in practice but some of the conflict of interest issues raised in section (2) of this submission could arise. That is, the integrity of the process could be weakened if the "accreditation authority" collects fees from the certifiers it accredits or has another form of relationship with a certifier that ought to be investigated.

The Commission also sees a potential conflict if a non-government "accreditation authority" is required to investigate the conduct of a person or organisation that it has previously certified.

Consequently, the Commission's view is that any approval guidelines issued under section 61 of the *Building and Development Certifier Act 2018*, or any other conditions ought to:

- consider the need to segregate or at least closely monitor the accreditation and investigation functions of an accreditation authority
- give the Secretary, or their delegate, the power to direct or take over the investigative functions of an accreditation authority
- make it clear that accreditation authorities perform public official functions and are therefore "public officials" under section 3 of the *Independent Commission Against Corruption Act 1988*.